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IN THE

Supreme Court of the United States

October Term, 1951

FREDRICA CLAUSEN, Doing Business as Luzerne Hide and Tallow Company,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Fredrica Clausen, doing business as Luzerne Hide and Tallow Company, petitioner herein, prays that a writ of certiorari be issued to the United States Court of Appeals for the Third Circuit to review the decree of that court entered on May 14, 1951, enforcing an order of the National Labor Relations Board (hereinafter called the "Board"), issued May 4, 1950, under Section 10 of the National Labor Relations Act as amended.

Opinions Below

The findings of fact, conclusions of law and order of the Board are reported at 89 NLRB 989 (R. B. 209a).[1] The opinion of the Court of Appeals is reported at 188 F. 2d 439 (R. 203-209).

Jurisdiction

The decision of the Court of Appeals was rendered on April 2, 1951, and its decree was entered on May 14, 1951. Thereafter, a petition for rehearing was timely filed by petitioner herein on May 28, 1951 (R. 214). The order of the Court of Appeals denying the petition for rehearing was filed on June 8, 1951 (R. 220). The jurisdiction of this Court is invoked under 28 U. S. C. Sec. 1254(1) and Section 10(e) of the National Labor Relations Act, as amended by the Labor Management Relations Act, 1947.

Questions Presented

1. Does the amended National Labor Relations Act accord benefits to strikers seeking to force recognition of a non-complying union?

2. Can a non-complying union circumvent the filing requirements of the amended Act through the device of having its officials file individual charges?

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[1] The record filed by petitioner with this Court is in three sections: The Board's Appendix below, Appellee's Appendix below, and a third section composed of the Petition for Enforcement and Supplementary Proceedings in the court below. Record references to Appellee's Appendix below will be indicated by "R. A.", followed by the page reference; references to the Board's Appendix will be indicated by "R. B.", followed by the page reference; references to the third printed section of the record will be indicated by "R.", followed by the page reference.

3. Can the Board compel employers to rehire, with back pay, economic strikers who have not withdrawn previously announced conditions for return to work?

Statute Involved

The pertinent provisions of the National Labor Relations Act, as amended, are set forth *infra* in the Appendix.

Statement

The Board's complaint in this case alleged that petitioner discriminated against certain employees on July 6, 1948, by refusing to rehire them because of their participation in a strike and that it discriminated against another employee on July 8, 1948 by discharging him because he sympathized with the strikers (R. B. 2a). The strike, which was the basis of the Board's charge, was designed to force petitioner to recognize Local Industrial Union 1644, C.I.O. (hereinafter called the "Union") as the bargaining representative of its employees (R. B. 168a). Neither the Local nor the International Union had complied with the financial statement and non-Communist affidavit filing requirements of Sections 9(f), (g) and (h) of the amended Act at the time of the strike or prior to the issuance of the Board's complaint (R. B. 41a).

Petitioner moved to dismiss the complaint on the ground, *inter alia*, that it fostered circumvention of the Act insofar as it was based upon charges filed by employees who were officials of a non-complying union (R. B. 162a). The Trial Examiner denied the motion and his ruling was affirmed by the Board. The Board concluded that petitioner had discriminated in refusing to rehire six of the strikers and in discharging one employee because of activity in support of the strike (R. B. 211a).

After issuance of its order on May 4, 1950, the Board petitioned the Court of Appeals for the Third Circuit for enforcement. On May 14, 1951, the court below issued its decree enforcing the Board's order and on June 8, 1951, its order refusing a rehearing was entered.

Specification of Errors to Be Urged

The court erred:

1. In holding that the amended Act accords benefits to strikers seeking to force recognition of a non-complying union.

2. In holding that a non-complying union can circumvent the filing requirements of the amended Act through the device of having its officials file individual charges.

3. In holding that the Board may compel employers to rehire with back pay economic strikers who have not withdrawn previously announced conditions for return to work.

4. In enforcing the Board's order.

Reasons for Granting the Writ

The question whether the amended Act protects strikers in their efforts to force recognition of a non-complying union is an important issue of federal law which has not been, but should be, settled by this Court. The decision of the court below that a Board complaint may be issued upon charges brought by individual officials of a non-complying union sanctions evasion of the filing requirements of the Act. The holding of the court below, in its construction of what constitutes an unconditional offer by economic strikers to return to work, conflicts with settled doctrine and the decision of another Court of Appeals.

1. The court below erred in holding that the amended Act accords benefits to strikers seeking to force recognition of a non-complying union. The court concluded that the strike of June 30, 1948, by a non-complying union "unquestionably was a legitimate, concerted activity within the Act" (R. 206). The case relied upon in reaching this conclusion was decided before the 1947 amendments to the Act.[2] It is submitted that the court's holding is contrary to Congressional intent.

The 1947 amendments introduced a new concept in the field of labor relations, *i.e.*, that labor unions seeking Government assistance must, as a condition precedent, meet certain requirements before gaining access to governmental machinery. Thus, Sections 9(f) and (g) of the amended Act provide that a labor organization shall file copies of its constitution and by-laws, financial statements and other pertinent information with the Secretary of Labor. Section 9(h) provides that each officer of a labor organization shall file an affidavit with the Board:

> "that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods."

The purpose of the statutory innovation was clear—to compel unions to meet certain minimum standards of financial responsibility and to minimize "the so-called 'political strike.'" See *American Communications Assn., C. I. O. et al.* v. *Douds*, 339 U. S. 382, 388. The method of achieving this end was equally clear—by denying non-complying

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[2] *Berkshire Knitting Mills Co.* v. *National Labor Relations Board*, 139 F. 2d 134 (C. A. 3).

unions the benefits of the amended Act. Thus, Section 9(h) provides that unless the non-Communist affidavit is filed with the Board by officials of a labor organization within the preceding twelve-month period:

> "No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, no petition under section 9(e)(1) shall be entertained, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 10, * * *"

The House Labor Committee, referring to the filing requirement of the Act, stated it "makes it incumbent upon union leaders who now tolerate Communist infiltration in their organizations, affiliates and locals, and temporize with it, to clean house or *risk loss of rights under the new act.*"[3] (Emphasis supplied.) Since non-complying unions have no rights under the Act, *a fortiori,* individuals striking in support of a non-complying union have no rights under the Act.

Prior to the enactment of the Wagner Act in 1935, the strike weapon involved great risks, both to a union and its individual supporters. Those risks were minimized with the passage of the Wagner Act. Some of those risks were revived by the 1947 amendments to the Act. For

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[3] For the convenience of the court, all references to the legislative history of the Act will refer to the two bound volumes compiled by the National Labor Relations Board and printed by the United States Government Printing Office in 1948, entitled "Legislative History of the Labor Management Relations Act, 1947." The quotation in the text appears at page 329 and is from House Report No. 245 on H. R. 3020. This statement referred to Section 9(f)(6) of the House bill which was carried over in principle in Section 9(h) of the Act as enacted.

example, the amendments deny a non-complying union access to Board machinery, and thus restore such a union and its supporters to their position pre-1935. Now a non-complying union has no access to the Board to complain of an employer's failure to accord recognition. Similarly, such a union has no access to the Board to complain of injury suffered by striking to force such recognition.

Congress did not limit the right of a non-complying union or its supporters to engage in strike action, but affirmatively deprived them of access to governmental machinery until there had been compliance with the filing requirements of the Act. When a non-complying union or its supporters strike for recognition, they assume the risk of participating in such activity. They cannot look to the Government for assistance in the achievement of their purpose, since such a strike is not protected activity within the meaning of the Act.[4]

The concept of withdrawing certain forms of concerted activity from the protection of the National Labor Relations Act is not a new one, either to Congress, the courts, or the Board. Thus, it has been held that the following concerted activities are not protected by the Act: engaging in a sit-down strike,[5] participating in a wild-cat strike,[6]

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[4] Cf. *International Union, U. M. W.* v. *National Labor Relations Board,* 184 F. 2d 392 (C. A. D. Col.), cert. den. 340 U. S. 934; *Scranton Broadcaster, Inc.* v. *American Communications Assn.,* 48 Lackawanna Jurist 241 (C. P. Pa. 1947); *Simons* v. *Retail Clerks Union,* 21 LRRM 2685 (Cal. Super. Ct. 1948).

[5] *National Labor Relations Board* v. *Fansteel Metallurgical Corporation,* 306 U. S. 240; *cf. Southern Steamship Co.* v. *National Labor Relations Board,* 316 U. S. 31.

[6] *National Labor Relations Board* v. *Draper Corporation,* 145 F. 2d 199 (C. A. 4).

refusing to cross a picket line of another union,[7] engaging in a slowdown.[8] The legislative history of the 1947 amendments reveals a Congressional intent to prevent the Board from ordering reinstatement of individuals who are not engaged in protected activity.[9] The Board recognizes this limitation in its Annual Reports. "However, the right of strikers to be reinstated, unless lawfully replaced in the case of an economic strike, is not absolute. It depends upon whether the strike itself is protected by the Act."[10]

The strike in the instant case was concededly designed to force petitioner to recognize a non-complying union (R. 205). The court below erred in concluding that such a strike "was a legitimate, concerted activity within the Act." In so holding, the court improperly grants a non-complying union and its supporters access to governmental machinery. The decision of the court below negates Congressional intent to deny the benefits of the Act to non-complying unions and their individual supporters.

Petitioner submits that the question of whether a strike to force recognition of a non-complying union is protected activity under the Act is an important issue of federal law which has not been, but should be, settled by this Court.

2. The court below erred in holding that a non-complying union can circumvent the filing requirements of the

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[7] *National Labor Relations Board* v. *Illinois Bell Telephone Co.*, 189 F. 2d 124 (C. A. 7).

[8] *Matter of Elk Lumber Company*, 91 NLRB No. 60.

[9] House Conference Report No. 510. Legislative History of the Labor Management Relations Act, 1947, at pages 542-544.

[10] Fifteenth Annual Report of National Labor Relations Board, at 109 (U. S. Government Printing Office, 1951); see also Fourteenth Annual Report of National Labor Relations Board, at 63-66 (U. S. Government Printing Office, 1950).

amended Act through the device of having its officials file individual charges. Therefore, apart from the question of whether a strike by a non-complying union is protected activity, the decision clearly conflicts with the policy of Congress described above in Point 1. In enacting Section 9(h) of the amended Act, Congress intended:

> ". . . to wholly eradicate and bar from leadership in the American labor movement, at each and every level, adherents to the Communist policy and believers in the unconstitutional overthrow of our Government."

See *National Labor Relations Board* v. *Highland Park Manufacturing Co.*, 95 L. Ed. 680, 682. Yet the decision of the court below allows union officials, who flout the requirements of the Act, to receive the benefits of the Act and thereby continue in union leadership.

The court below conceded that some of the charging parties were union officers or key union supporters. Thus, it stated that of the seven complainants ordered reinstated:

> "Harry Kishbaugh is president of the union. Schell is vice-president. Sterling Kishbaugh, Sr. and Ertwine are committeemen. The evidence strongly indicates that all of these men were prominent in the union movement" (R. 205).

The decision of the court below that these individual complainants could press their charges, despite their position in the union, clearly contravenes the Congressional policy "to wholly eradicate and bar from leadership" individuals who refuse to comply with the filing requirements of the Act.

The court below concluded that the relief sought in the charges was only for the individual complainants, despite its concession that the moving parties were union officers or key union supporters (R. 208). It relied upon two

cases in reaching its decision: *National Labor Relations Board* v. *Schwartz*, 146 F. 2d 773 (C. A. 5) and *National Labor Relations Board* v. *Augusta Chemical Co.*, 187 F. 2d 63 (C. A. 5). The former case was before the 1947 amendments to the Act and, therefore, not relevant. The latter case is distinguishable. Examination of the Board's findings upon which the Fifth Circuit decision is based reveals that the individuals concerned there were not officers of the non-complying union. *Matter of Augusta Chemical Co.*, 83 NLRB 53.

The Board has held that a non-complying union may not evade the statutory requirements by using an individual or a complying organization as a "front," thus "achieving representative status clandestinely."[11] In the instant case, the charging individuals were clearly acting in support of the non-complying union. The individual charges were filed after two previous unsuccessful attempts by the non-complying union. First, it filed charges before the Pennsylvania State Labor Relations Board which does not require a non-Communist affidavit (R. B. 166a). These charges were dismissed for lack of jurisdiction since the Company is engaged in interstate commerce (R. B. 167a). Then the Local Union president filed a charge on behalf of all the individuals with the National Labor Relations Board (R. A. 1a). This charge was prepared in the office of the International C. I. O. Field Representative (R. A. 57a). This charge too was dismissed (R. A. 5a). The individual charges, upon which the Board complaint herein was issued, alleged substantially the same facts set forth in the two previous charges filed by the union and its president.

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[11] Fifteenth Annual Report of the National Labor Relations Board, 1950, at 22 (U. S. Government Printing Office, 1951), and cases cited therein. See also *White* v. *Douds*, 80 F. Supp. 402 (S. D. N. Y.).

The Board improperly restricts the "fronting" doctrine to situations directly affecting the status of a union, such as cases alleging refusal to bargain (R. B. 163a). The court below adopted the Board's rationale and held that the benefits accruing to the union in the instant case by the filing of the individual charges were "remote and unsubstantial" (R. 208). This holding is unrealistic. The history of labor relations indicates that when unions succeed in securing reinstatement of officers or key leaders, their prestige is generally enhanced and, as a result, they frequently achieve a status as exclusive bargaining representative. The decision below frustrates Congressional intent to deprive a non-complying union of prestige and status and to "bar from leadership" individuals who flout the filing requirement. Petitioner submits that as a matter of law, the processes of the Board should be denied to the officials and key supporters of a non-complying union.

Senator Taft has expressed the concern of some Congressmen with Board decisions that have "tended to retard the effectiveness of non-Communist oaths when it has been necessary to rule on close legal points." In discussing this problem on the Senate floor, Senator Taft criticized the Board's practice of sanctioning the evasive device of having individual employees use the Board's processes where the non-complying union could not.[12]

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[12] On June 4, 1951, Senator Taft pointed to numerous Board decisions which, in his opinion, undermine some of the amended Act's "most important principles." To illustrate his criticism, he referred, *inter alia,* to *Matter of Rawleigh Co.,* 90 NLRB 217, as follows:

> "In this case the employer was held to have violated the law when he solicited individual strikers to return to work during a strike called by Harry Bridges' International Longshoremen's & Warehousemen's Union. The charge was filed by individual employees

The number of unfair labor practice charges received from individuals has increased substantially since the filing requirements became effective in August, 1947. Statistics published in the Board's Annual Reports show that the ratio of cases filed by C. I. O. affiliates to those filed by individuals has reversed itself. Before the effective date of the filing requirements, C. I. O. affiliates filed approximately eight times as many charges as individuals. In the fiscal year ending June, 1948 (the first year in which the filing requirements were effective), individuals filed three times as many charges as C. I. O. affiliates.

		IDENTIFICATION OF COMPLAINANT[13]			
Fiscal Year Ending June	Total Cases Received	A. F. of L. Affiliates	C. I. O. Affiliates	Unaffiliated Unions	Individuals
1946	3,815	1,531	1,834	239	211
1947	4,232	1,573	2,001	401	257
1948	2,553	852	348	194	1,159
1949	4,154	1,485	764	436	1,469
1950	4,472	1,614	1,023	613	1,222

Thus, the opportunity for a non-complying union to evade the filing requirements of the Act by using an individual "front" is enlarged.

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since the union could not use the law because its officers had not complied with the non-Communist oath requirement. Nevertheless, the Board ordered the employer to cease and desist from discouraging membership in the union" 97 Cong. Rec. 6217 (June 4, 1951).

[13] Statistics set forth in this table have been taken from the Eleventh, Twelfth, Thirteenth, Fourteenth and Fifteenth Annual Reports of the National Labor Relations Board at pages 75, 67, 97, 157 and 219, respectively.

The substantial increase in the number of cases filed by individuals since the filing requirements became operative makes this issue important in the administration of the Act. The decision of the court below that individual officers may use governmental machinery in support of a non-complying union is contrary to Congressional intent.

Petitioner submits that the question of whether a non-complying union can circumvent the filing requirements of the amended Act through the device of having its officials file individual charges is an important issue of federal law which has not been, but should be, settled by this Court.

3. The court below erred in holding that the Board may order an employer to rehire with back pay economic strikers who have not unequivocally withdrawn previously announced conditions for return to work. As such, it chips away the authority of the long-established doctrine that an employer need not rehire economic strikers until they have made an unconditional application for reinstatement. See Third Annual Report of the National Labor Relations Board and cases cited therein at 78.

The opinion below also conflicts with a decision of the Court of Appeals for the Fifth Circuit in *National Labor Relations Board* v. *Crosby Chemicals, Inc.,* 188 F. 2d 91.

It is undisputed that the strikers in the instant case, on July 1, 1948, informed petitioner that recognition of the non-complying union was a condition precedent to their return to work and that the International C. I. O. Field Representative, on July 6, 1948, urged the men not to return to work unless petitioner entered into a collective bargaining agreement with the union (R. B. 169a-172a; 174a). The decision of the Board revolved around a finding that a request "in unison" by a group of milling men informally meeting outdoors constituted an unequivocal withdrawal of a previously attached condition (R. B.

174a). The record discloses no evidence, however, to support a withdrawal of previously announced conditions. The Trial Examiner stated that "the record is not entirely clear as to the exact order in which the meeting developed." He found that the request "in unison" that the men "wanted their jobs back" was an "unconditional application for reinstatement" (R. B. 174a). The Board in its decision adopted the Trial Examiner's finding without discussion.

It is submitted that the court below failed to assume increased "responsibility for the reasonableness and fairness" of the Board's decision and did not exercise its enlarged power of review under the amended Act. See *Universal Camera Corporation* v. *National Labor Relations Board,* 340 U. S. 474, 490. Assuming *arguendo* that there was some sort of vague request "in unison" for jobs back, the key finding that this constituted an "unconditional application for reinstatement" is not supported by substantial evidence on the record considered as a whole.

A similarly ambiguous offer to return to work was held by the Fifth Circuit not to be unconditional in *National Labor Relations Board* v. *Crosby Chemicals, Inc.,* 188 F. 2d 91. The court there followed the long-established rule that an employer is under no obligation to rehire economic strikers unless and until they unequivocally announce their intention to return to work.

The result of the decision in the instant case is to carve a large exception to long-established doctrine. Petitioner submits that the question of what constitutes an unconditional offer to return to work is an important issue of federal law affecting the administration of the Act on which there is conflict in the Courts of Appeals. The issue should be clarified by this Court.

CONCLUSION

Because of the reasons stated, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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